

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
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CLERK, U.S. DISTRICT COURT
BY _____
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3:06-CV-1394-P
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Pursuant to the provisions of 28 U.S.C. § 636(b), and an order of the District Court in implementation thereof, this case has been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge are as follows:

Type Case: This is a petition for habeas corpus relief brought by an immigration detainee pursuant to 28 U.S.C. § 2254.

Statement of the Case: On September 20, 2002, Petitioner pled guilty pursuant to a plea agreement to the offense of theft in Criminal County Court Number 7 of Dallas County, Texas,

in Cause No. MB02-58084. (See Petition (Pet.) at 3, and Attachment I). Punishment was assessed at 40 days imprisonment.

On December 20, 2003, Petitioner also pled guilty pursuant to a plea agreement to the offense of theft in Criminal County Court 4 of Dallas County, Texas, in Cause No. MB02-18499. (See Petition (Pet.) at 4, and Attachment I). Punishment was assessed at 60 days imprisonment.

On February 28, 2006, Petitioner filed a motion for leave to file an original application for writ of habeas corpus in the Texas Court of Criminal Appeals. Ex parte Francis Tejani Kundra, No. WR-63,039-07, <http://www.cca.courts.state.tx.us/opinions/Case.asp?FilingID=241419> (Docket sheet information generated from the Texas Court of Criminal Appeals Website on August 9, 2006). On July 19, 2006, the Court of Criminal Appeals denied the motion for leave to file without written order. Id.

In his federal petition, filed on August 2, 2006, Petitioner seeks to challenge his misdemeanor convictions on the ground that he did not commit theft as alleged in the charging instrument. He explains that the misdemeanor cases “were used to enh[ance] a case that the INS used to make me deportable.” (Pet. at 5).

Findings and Conclusions: A federal court may consider a writ of habeas corpus only “on behalf of a person in custody . . . in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

Presently Petitioner is not incarcerated on the basis of his 60 and 40-day sentences in No. MB02-58084 and MB02-18499. He concedes those sentences were fully served in 2002, and that he is awaiting final disposition of his removal proceeding. (Pet. at 3-4). As a result,

Petitioner cannot bring a federal habeas action based solely on his convictions in No. MB02-58084 and MB02-18499. See Maleng v. Cook, 490 U.S. 488, 493 (1989).

In Maleng, 490 U.S. at 493-94, and Lackawanna County District Attorney v. Coss, 532 U.S. 394, 401-02 (2001), the Supreme Court acknowledged that because a § 2254 petition could be construed as asserting a challenge on a current sentence, as enhanced by an allegedly invalid prior conviction, a petitioner could satisfy the “in custody” requirement for federal habeas jurisdiction despite the full expiration of his sentence.

The claims raised in the petition -- namely that Petitioner did not commit theft -- do not allege facts sufficient to raise an “in custody” issue under Maleng and Lackawanna. Nor does the fact that Petitioner is facing deportation consequences indirectly as a result of his misdemeanor convictions lead this Court to conclude that he can satisfy the in custody requirement.

Accordingly, Petitioner’s challenge to his convictions in Nos. MB02-18499 and MB02-58084 should be dismissed for want of jurisdiction because he can not satisfy the “in custody” requirement.

RECOMMENDATION:

For the foregoing reasons, it is recommended that the petition be dismissed for want of jurisdiction for failure to satisfy the in custody requirement.

A copy of this recommendation will be mailed to Petitioner.

Signed this 7th day of September, 2006.



WM. F. SANDERSON, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE

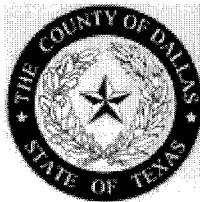
In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten days after being served with a copy of this recommendation. Pursuant to Douglass v. United Servs. Auto Ass'n, 79 F.3d 1415 (5th Cir. 1996) (en banc), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten day period may bar a *de novo* determination by the district judge of any finding of fact or conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

ATTACHMENT I



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DA CASE ID MB0218499

JUDCL CASE ID MB0218499

A010 DEF NAME KUNDRA

C010 DEF NAME KUNDRA

TITLE

DISPOSITION

C020-01-02

CT DISP NO 01

VERDICT DATE 122002 BY JG DISP PGBC TC __ DISM TYP __ VOL 059 PAGE 0359

SENTENCE DATE 122002 BY JG TO J YEARS __ MTHS __ DAYS __60 HOURS __

SENTENCE TO BEGIN 121302 SENTENCE VOL __ PAGE __ DISCHARGE N TYPE _ NUM __

PROBATED SENTENCE TO _ YEARS __ MONTHS __ DAYS __ MULT SENT _

PROBATED FOR YEARS __ MONTHS __ DAYS __ PROBATION START DATE __

SPEC COND 1 _ FOR _ 2 _ FOR _

FINE CODE N AMT __0.00 COST CODE N AMT __221.00 PAYMENT DUE __

REDUCED/ENHANCED CHARGE

DESC __ COMT __ TYP/CL _ _ GOC _

COUNTY CODE __ STATE CODE __

PROBATION REVOCATION FILE DATE __ WARRANT ISSUED DATE __

DISPOSITION COMMENT FCC_TO_RUN_CC/CI __

TITLE

GENERAL COMMENTS

C080 010903_CI_RETURNED_SERVED_20_DAYS,GIVEN_40_DAYS_GT,_F/CC_RUNS_CC__

DATE 010903 01

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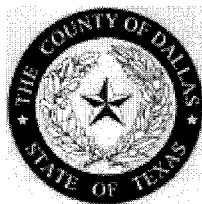
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DA CASE ID MB0258084

JUDCL CASE ID MB0258084

A010 DEF NAME KUNDRA

C010 DEF NAME KUNDRA

TITLE

CHARGE

C010

DEF NAME KUNDRA_FRANCIS_TEJANI OFFENSE CD TH000000 STATE CD 23990067

DESC THEFT_50 COMT TYP/CL M B GOC

GJ COURT CURRENT COURT MH PREVIOUS COURTS CHOV DT

TITLE

DISPOSITION

C020-01-02

CT DISP NO 01

VERDICT DATE 092002 BY JG DISP PGBC TC DISM TYP VOL 056 PAGE 0161

SENTENCE DATE 092002 BY JG TO J YEARS MTHS DAYS 40 HOURS

SENTENCE TO BEGIN 092002 SENTENCE VOL PAGE DISCHARGE N TYPE NUM

PROBATED SENTENCE TO YEARS MONTHS DAYS MULT SENT

PROBATED FOR YEARS MONTHS DAYS PROBATION START DATE

SPEC COND 1 FOR 2 FOR

FINE CODE AMT 0.00 COST CODE N AMT 221.00 PAYMENT DUE

REDUCED/ENHANCED CHARGE

DESC COMT TYP/CL GOC

COUNTY CODE STATE CODE

PROBATION REVOCATION FILE DATE WARRANT ISSUED DATE

DISPOSITION COMMENT T/F/CC_RUN_CC/CI_ISS/CR_DEF_BT_7_DAYS

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